No. 5050.

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United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of the Petition of the ALASKA STEAMSHIP COMPANY, a corporation, owner of the Steamship "VICTORIA," an American Vessel, for Limitation of Liability,

Petitioner and Appellee,

C. L. ANDERSON and Forty-two Others,

Claimants and Appellants.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

LAWRENCE BOGLE,

CASSIUS E. GATES,

Proctors for Appellee.

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BRIEF OF APPELLEE

This proceeding was commenced by the Alaska Steamship Company, owner of the steamship "Victoria," for limiting its liability, if any, on account of any loss, damage or injury arising on voyage 140 of said steamship "Victoria" from Nome, Alaska, to Seattle, Washington.

In its petition for limitation of, and exemption from, liability the said Alaska Steamship Company, appellee herein, alleged that it was the owner and operator of the steamship "Victoria"; that said vessel sailed from the port of Nome, Alaska, on August 22, 1924; and after touching at various way ports, arrived at Seattle, Washington, on September 4, 1924; that at the time of leaving Nome, Alaska, it had on board 56 steerage passengers; that she thereafter called at Dutch Harbor on August 25th, taking on passengers, called at Akutan on the same date, taking on cargo and additional passengers, called at False Pass on August 26th, took on cargo and additional passengers, called at Seward, Alaska, where she took on cargo, ship's supplies and additional passengers, and on August 30th called at Latouche, Alaska, taking on additional passengers, called at Drier Bay on said August 30th and took on additional cargo and passengers, and sailed thence to the Port of Seattle; that at the time of leaving Drier Bay she had 342 passengers, of whom 190 were steerage passengers. That on September 5, 1925, 42 persons claiming to have been steerage passengers on said vessel on said voyage filed a demand with the petitioner, Alaska Steamship Company, for $250.00 each for alleged breach of contract of carriage on said voyage (Ap. p. 2); and that thereafter 30 of said persons, who had filed such demand, commenced separate actions against the said Alaska Steamship Company in the State Court claiming damages in the sum of $1000.00 each for alleged

breach of contract of carriage; that 12 additional suits were threatened claiming damages in the sum of $1000.00 each, and that if any liability existed for or on account of breach of contract on said voyage that the total of such claims would far exceed the value of the said steamer and her pending freight at the termination of said voyage (Ap. p. 5). The said petition, while denying any breach of contract on the said voyage of said vessel, alleged that if such breach did occur, or any other damage was done on said voyage, that the same was without the privity and knowledge of the Petitioner, and Petitioner sought the benefits of the Limitation of Liability Statutes of the United States. The petitioner claiming both an exemption from, or in the alternative, a limitation of, liability, prayed for the appointment of appraisers and for the issuance of other processes as in such cases provided.

After due notice to the attorney for the Plaintiffs in the suits pending in the State court, the lower court appointed three appraisers to appraise the value of said steamship "Victoria" and her pending freight at the termination of said voyage, and such appraisement was duly returned, fixing the value of said vessel and her pending freight at $79,820.61. A bond for said amount was subsequently approved and filed, and an order entered restraining the further prosecution of the State court actions; ordering that due notice be given and claims filed with the Hon. A. C. Bowman, U. S. Com-

missioner, on or before November 1, 1924 (Ap. p. 12).

On or before said date 43 claims for $1000.00 each were filed with the U. S. Commissioner for alleged breach of contract of carriage and one claim was filed for alleged personal injury sustained on the aforesaid voyage. In due time objections and exceptions were filed by the Petitioner to each of said claims; and thereafter on April 23, 1925, the cause being at issue, an order was entered referring the same to the Hon. A. C. Bowman, U. S. Commissioner, for the taking of testimony, with directions to return the same together with the said Commissioner's Findings of Fact and Conclusions of Law. In pursuance of said order of reference voluminous testimony was taken on behalf of the parties thereto and on July 15, 1926, the Commissioner returned the same together with his Findings of Fact and Conclusions of Law to the lower court. The Commissioner found:

> "Paragraph 3 of the Amended Answer and claims sets forth the terms of the contract of carriage claimed to have been entered into between the claimants and the Petitioner for the voyage in question.
>
> I find no testimony in the record to support the contract above mentioned, and the testimony offered in the case must be considered as applying to the duty imposed on a common carrier of passengers to the claimants.
>
> I find from the testimony in the case that

the several claimants purchased from the agent of the Petitioner at Nome, Alaska, tickets for the passage from Nome to Seattle, on the steamship Victoria which sailed from Nome bound for Seattle, on August 22, 1924. That these tickets cost the claimants fifty dollars each and bore the legend 'Good for one STEERAGE passage as indicated'. These tickets were accepted by the officers of the steamship Victoria, and the holders of the tickets were assigned quarters in the steerage department of the vessel, where standee bunks were arranged; the claimants selecting their bunks as they came aboard.

That No. 1 steerage had accommodations for 72 passengers, and at the time the Victoria left Nome on the voyage in question there were 56 steerage passengers on board, among whom were the claimants in this case.

After leaving Nome the Victoria touched at several way-ports where additional steerage passengers were picked up, to the number of 134, making the total number of steerage passengers 190, 102 of whom were Orientals.

The evidence shows that the vessel had authority from the Local Inspectors to carry 284 steerage passengers in Nos. 1 and 2 steerage departments.

That each of the claimants had made the voyage north from Seattle to Nome in the steerage of the Victoria in the spring of the year 1924, and that there were a greater number of passengers in the steerage at that time than on the return trip in August, 1924. Further, that a number of the claimants had made trips to Alaska and return, in the steerage of the Victoria, for many years.

The claimants made the voyage to Alaska for the purpose of prospecting as miners or as

wage earners; a number of them being under contract to work for the Hammond Mining Company located at Nome.

Due to a strike of employees of the Hammond Mining Company participated in by some of the claimants and other of the claimants affected by the closing down of operations of the company, returned to Seattle on the Victoria on the voyage in question.

In support of their claims for damages, the claimants in their testimony specify certain conditions which they claim existed on the vessel during the voyage, namely:

(1) That the food was not fit for human consumption and that they were unable to eat it, and were forced to go hungry or purchase food from under-stewards or waiters;

(2) That the steerage was not properly ventilated, causing headache and other disagreeable reactions;

(3) That the steerage was not kept clean; vomit from seasick passengers not being promptly removed, causing offensive odors to permeate the steerage;

(4) That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health;

(5) That gambling was allowed to be carried on in the dining room (on the deck above the steerage), during the day time and night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night.

It does not appear from the testimony that the claimants or any one of them complained to the captain or other deck officer about the

above mentioned conditions, or asked that they be remedied. It appears clearly from the testimony that the master of the vessel and other deck officers made inspection visits to the steerage at least once each day.

I find from the testimony presented, that

(1) The Victoria was staunch, properly manned, equipped and victualed for the voyage in question;

(2) The food of the first class passengers, officers, crew and steerage was of the same quality (with the exception that the coffee of the crew and steerage was of a lesser grade), and cooked at the same time and in the same vessels;

(3) Owing to the limited capacity of the dining room, it was not possible to seat all the steerage passengers at one time, and several seatings had to be made;

(4) It was a matter for the passengers to decide who was served first or otherwise;

(5) The food was served "family style," and the passengers helped themselves.

I find from the testimony that the ventilation of the steerage of the Victoria was not other or different than had been in use on prior voyages of the Victoria; that the hatches were open whenever the weather permitted, in addition to the customary deck ventilators.

I further find that the steerage passengers were not limited in their movements about the various decks of the vessel; that many of them used the smoking and lounging room of the first class passengers, without objection on the part of the officers of the ship."

With reference to the personal injury claim filed by the Claimant, Jack Miles, the Commissioner found:

"The claimant Jack Miles in his amended answer and claim asks for damages for breach of the contract of carriage and also for personal injury during the voyage.

I find from the testimony that during the voyage the claimant Jack Miles was employed by the officers of the vessel to assist in stowing certain cargo taken on at way ports. That during the process of stowing certain barrels in one of the after holds, Miles with two other men similarly employed rolled one of the barrels to its proper place, leaving it for another man to block in position; that he turned and walked toward the opening of the hatch to help care for other cargo coming in; that the barrel which he had just left rolled and struck his left heel, breaking the outer bone of the left foot. Miles also testified that the hold in which he was employed as stevedore was not properly lighted; that this fact contributed to his injury. It also appears from the testimony that the person to whom Miles delivered the barrel which caused the injury, did not properly block the barrel in position which was a part of his duty. It also appears from the testimony that Miles did not complain of the improper lighting to the officer of the ship in charge of the gang of men with whom Miles was working. It further appears from the testimony of the physician who examined and treated the injury to Miles' foot after reaching Seattle, that the injury was not of a serious nature and that the wearing of a shoe would hold the bones in proper position for healing.

During the taking of testimony in the case the claimant Jack Miles died from cerebral

hemorrhage at Tacoma, and letters of administration were taken out to administer his estate by his widow, Helen G. Miles, as shown by the record."

From these Findings the U. S. Commissioner recommended as his conclusions of law that the claims filed and verified personally by 22 of the claimants be dismissed

"For the reason the testimony as to damages sustained by said Claimants is not convincing and the testimony of the Petitioner shows by a fair preponderance that said Claimants are not entitled to damages in any sum for breach of the implied contract of carriage." The Commissioner further recommended as his conclusion of law that the claims filed on behalf of 21 of said steerage passengers which were verified by their proctor be dismissed for the reason, 1st, "the amended answer and claims were verified by their proctor without cause being shown for such verification as required by the Admiralty rules of this court"; and 2nd, "for the reasons set forth in paragraph 1 of these conclusions" (Ap. p. 1102).

As to the personal injury claim of Jack Miles, the Commissioner recommended that the same be dismissed. The Commissioner further recommended that each party pay the costs incurred by such party (Ap. p. 1103). This latter conclusion was clearly erroneous, as will be argued in the subsequent portion of this brief.

Thereafter, and on July 20, 1926, the Claimants' objections and exceptions to the Commissioner's Findings of Fact and Conclusions of Law were duly filed and the cause was thereafter submitted to the Hon. Frank S. Dietrich, sitting in the lower court, as a district Judge, upon oral argument and written briefs, and on August 25, 1926, Judge Dietrich's memorandum decision on the merits was filed herein sustaining and affirming the Findings and Conclusions of the said Commissioner.

Judge Dietrich's memorandum decision on the merits follows:

> "The issues were referred to a Commissioner, with directions to receive proofs and to report the same with findings of fact and conclusions of law. To findings wholly adverse to their claims, claimants have filed numerous exceptions, requiring an examination of the entire record. Such examination I have made.
>
> A more extreme case of conflicting testimony it would be difficult to imagine. All the witnesses were 'interested.' Claimants first produced nine of their own number who testified that the food and sanitary conditions on the ship were shockingly bad. In defense the petitioner called most, if not all, of the ship's officers, who denied substantially all the specific charges of misconduct and described the food and sanitary conditions as being good. In the guise of rebuttal claimants then produced seven more of their number, whose testimony was along practically the same lines as that of the first nine.
>
> In view of the conditions, it is greatly to be regretted that in taking the testimony care

was not exercised to follow rules which are designed in a measure to counteract the natural tendency of 'interested' testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court undoubtedly these rules would have been enforced, but apparently it was assumed that the Commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight.

The issues are well stated in the Commissioner's report, and no useful purpose would be subserved by an abstract of the voluminous testimony. In resolving the sharp conflict between the two groups of witnesses the Commissioner had the advantage of seeing and hearing the witnesses; and therefore a measure of weight attends his findings.

Of great significance, I think, is the fact that with scarcely an exception, the claimants made no complaint to the ship's officers during the voyage. If, as they now testify, the food was so rotten and so manifestly unfit for human consumption, and if the conduct of the Orientals at the table was so outrageously repulsive, and if the air in the sleeping quarters was so intolerably foul, and the floors in both the sleeping and dining quarters and the toilets were so unspeakably filthy, it is incredible that the passengers would have meekly submitted. There were eighty-eight white passengers in the steerage. Insofar as it appears, forty-six of them never made complaint to the officers during or after the voyage, and of the forty-two who are

here asserting claims, admittedly no one made complaint during the voyage to any one of the general officers in respect to the food or general sanitary conditions, and but few made any complaint whatever even to a subordinate. They were not timid, unsophisticated women and children; apparently they were men of experience, conscious of their rights and of a temper to assert them. I am unable to believe that, if such conditions existed as they describe, they would have gone hungry for days and lived in such filth without vigorous and organized protest. The case they make is thought to be contrary to reason and general experience; and upon the whole I am inclined to concur in the Commissioner's conclusions. Doubtless, there was some gambling in the card games, but here, too, it is thought claimants have greatly exaggerated the effect upon their comfort. The steerage was crowded, but the rules were relaxed, and without serious interference steerage passengers were permitted to frequent and occupy other parts of the vessel ordinarily reserved for passengers of other classes."

With reference to the claim of Jack Miles for personal injury and the claim of Helen G. Miles as administratrix of the estate of Jack Miles, deceased, Judge Dietrich finds:

> "The evidence upon this claim is extremely meager, and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was, it was the negligence of a fellow servant, for which, under the established rule in this Circuit, recovery cannot be had." (Ap. p. 1114.)

On September 22nd, 1926, final decree was entered in accordance with the memorandum decision

of Judge Dietrich dismissing the claims without cost. On December 21st, 1926, notice of appeal was filed and the cause is now before this court upon the typewritten Apostles on appeal.

All of the testimony on behalf of the claimants and all the testimony on behalf of the Petitioner was taken before the Hon. A. C. Bowman, United States Commissioner. Under the well settled rule applicable in admiralty, the findings of the Commissioner from conflicting evidence upon questions of fact, will not be disturbed by this court unless clearly against the weight of evidence. If such findings are supported by competent evidence, they will not be disturbed on appeal.

Luckenbach S. S. Co. vs. Campbell, 8 Fed. (2nd) 223.

Cary-Davis Tug & Barge Co. vs. United States, 8 Fed. (2nd) 324.

And where such findings of fact have been reviewed by the District Court and affirmed in all respects, this court will not disturb the same except for very apparent and manifest error.

> "The question is one of fact depending very largely upon the credit to be given to the various witnesses seen and heard by the Commissioner. Under these circumstances not only is there very reasonable presumption in favor of the Commissioner's finding and the decree of the District Court based upon such finding, but this Court would not be justified in setting aside or modifying the decree unless there clearly appears to have been error or mistake in the

finding of the Commissioner or the conclusion drawn therefrom."

United S. S. Co. vs. Haskins, (C. C. A. 9th Circuit) 181 Fed. 962 at page 964.

ARGUMENT.

For the purpose of clarity and argument, we will in this brief designate the Appellee in this court as Petitioner and the Appellants in this court as Claimants.

This being a proceeding for limitation of liability, the cause is initiated by the filing of the Petition setting forth the facts showing the Petitioner's right, first, to a total exemption from all liability, and second, in the event the exemption is denied, then the Petitioner's right to limitation of its liability. Two distinct issues are thus presented.

The S. S. "Hewitt," 284 Fed. 911.

The Claimants may either admit the Petitioner's right to limitation, contest Petitioner's right to total exemption, or Claimants may contest both issues. The basis of the Claimants' right to enter a contest upon either issue of exemption or limitation is predicated upon a claim filed in the limitation proceeding. Claims filed in limitation proceedings are in the nature of original libels and must set forth the

facts upon which the Claimants' cause of action against the Petitioner is predicated, with the same degree of distinctness and clearness that is required of an original libel in admiralty.

In Re Davidson S. S. Co., 133 Fed. 411;
The Pere Marquette, 203 Fed. 127.

The burden of proving the allegations of the claims is always upon the Claimants to the same extent that the burden of proving the allegations of an original libel in admiralty is upon the libellants,

"The John H. Starin," 191 Fed. 800;
The "Titanic," 225 Fed. 747;
The 84-H, 296 Fed. 427.

While the burden establishing Petitioner's right to limitation of liability is always upon the Petitioner, this issue was not contested in the lower court, and in any event, it appearing that the total amount of claims filed with the Commissioner were less than the appraised value of the said vessel and her pending freight, the issue of limitation of liability becomes immaterial.

The Santa Clara, 174 Fed. 913.

In the lower court the Claimants moved for a dismissal of the limitation proceedings upon the ground that the total amount of claims filed were less than the appraised value of the said vessel and her pending freight at the termination of the voyage. The lower court denied this motion.

"The motion must be denied. From the statements in the several claims filed, it is clear that the conditions that obtained in the steerage was common, and if these claimants are entitled to recovery, other passengers may have equal right and the Court cannot say that if forty-three claimants are entitled to $45,000.00 exclusive of costs, the remaining One hundred and forty-five claimants would not be entitled to more than the difference between $45,000.00 and $79,821.60, the value of the ship and her pending freight. * * * The order of this Court fixing or limiting the time within which claims may be filed is not a bar to the prosecution of an action within the period limited by statute if this proceeding should be dismissed. Hence, there is a probability of claims in excess of the value of the vessel and pending freight and the right of limitation is not defeated by the fact that the claims upon which suit has been commenced do not amount to the admitted value of the ship where there is a probability that there may be other claims. *The Defender,* 201 Fed. 189." (Ap. p. 55.)

The right of a petitioner to maintain limitation of liability proceedings is to be determined from the probable or possible amount of claims *at the time the proceeding is initiated.* If it appears clearly *from the petition* that the total of all possible claims cannot equal the appraised value, then limitation proceedings clearly would not lie (*Shipowners' & Merchants' T. Co.,* 218 Fed. 161), but if at the time the petition is filed there is a possibility that the total of all claims may exceed the value of said vessel and her pending freight, then the proceedings will lie and the fact that the total amount of claims

subsequently filed do not equal the appraised value of the vessel and her pending freight would not oust the court of jurisdiction.

The George W. Fields, 237 Fed. 403;
The Defender, 201 Fed. 189;
Benedict on Admiralty, (5th Ed.) Sec. 495.

In this case, it is clear, as stated by Judge Neterer, that the total amount of possible claims would far exceed the appraised value of the vessel and her pending freight provided the claims actually asserted at the time the petition was filed were valid. At said time forty-three claims had been asserted claiming damages in the sum of $45,000.00. There were one hundred and forty-five additional steerage passengers, similarly situated to those filing claims and on the basis of the claims filed, these additional passengers would be entitled to $145,000.00, or a total of all possible claims of $190,000.00, being far in excess of the appraised value of said vessel and her pending freight. In answer to this contention, Claimants assert that there was limitation in the steerage passenger tickets limiting their time for filing claims to a period of ten days from the date of the vessel's arrival at destination, which limitation the Claimants assert was reasonable and valid. There are two obvious answers to this contention.

First: It appears from the Claimants' own brief that of the one hundred and ninety steerage passengers, one hundred and two were Orientals, and that no steerage ticket was issued to these Orientals,

so they of course were not subject to this limitation of time within which to file claim.

Second: The validity of the ten day limitation for filing claims is dependent on whether or not the same is under all the circumstances reasonable. In other words, the limitation contained in the passenger tickets is a matter of defense to be asserted by the carrier. It is not a matter of absolute defense, but is one depending upon all the facts and circumstances of the voyage and would have to be litigated in the proceedings.

Third: The lower court in a prior case involving the identical ten day limitation contained in passenger tickets *on this same vessel* on this identical voyage held the same to be unreasonable and void.

Blackwell vs. Alaska S. S. Co., 1 Fed. (2nd) 33A.

The claimants further contend that the total amount of claims filed being less than the appraised value of the vessel and her pending freight, that the Petitioner is not entitled to contest the issue of exemption, but on the contrary the Claimants are entitled, without further proof, to a decree for the full amount of damages claimed. The absurdity of this contention is apparent on the face of it.

In the first place, it presupposes that upon filing a petition of limitation, there is an absolute admission of liability concerning which limitation is sought, or stated in another way, that a Petitioner,

in seeking the benefit of the limitation of liability statutes, is deprived of any right to contest either its liability or the amount of the claim. Under the American law it is established that a shipowner seeking the benefit of the limitation of liability statutes may either admit liability and waive the right of exemption and seek merely the limitation of such liability, or he may deny any liability, claiming a total exemption therefrom and in the alternative, seek a limitation of liability, in the event his claim for exemption is denied.

Benedict on Admiralty (5th Ed.), Sec. 485.

In this case the Petitioner expressly denied all liability and prayed for a total exemption therefrom and in the alternative, asked for a limitation of liability in the event his claim for exemption should be denied.

The fact that the total claims filed were less than the appraised value of the vessel and her pending freight has no bearing upon this issue.

Claimants' further contention that the mere filing of a verified claim is sufficient to establish the same without further legal proof is clearly unfounded. The burden of proof as to liability of the Petitioner and the amount of damages sustained by the Claimants is always upon the Claimants.

"The John H. Starin," 191 Fed. 800.

Rule 85 in Admiralty of the lower court pro-

vides that proof of claim shall, in the first instance, be by affidavit specifying the grounds and the amount, etc., and that such proof shall be deemed sufficient, unless the claim be objected to by the Petitioner or some other Claimants, in which event "any claims so objected to must be established by a further legal *prima facie* proof or notice to the objecting party as in ordinary cases."

Petitioner herein having filed due and timely objections to each of the claims, the burden of establishing liability and the amount of damages sustained by each Claimant was clearly upon the Claimants.

In the case at bar, out of forty-three claims filed, only nine claimants appeared and testified in support of such claims and as found by the Commissioner and affirmed by Judge Dietrich, such proof neither established liability of Petitioner or any basis of damages.

We will now discuss the question raised by this appeal as to the merits of the claims herein filed. There are two classes of claims to be considered.

First: Claims for breach of contract of carriage and Second, claims for personal injury and death of Jack Miles.

We will discuss these in order.

CLAIMS FOR BREACH OF CONTRACT OF CARRIAGE.

In view of the adverse findings of both the Commissioner, before whom all the testimony was taken, and his Honor Judge Dietrich, who made a full review of the record upon the exceptions of the Commissioner's findings and conclusions, we need only consider the question as to whether or not such findings and conclusions of the two lower tribunals are supported by any competent evidence. In considering this question, we will make no attempt to follow the Claimants' brief herein, for the simple reason that said brief is written very largely entirely apart from the record. As the burden was upon the Claimants to establish by a preponderance of evidence, a breach of contract and the damages accruing therefrom, to each of the Claimants, the discussion should be limited strictly to the facts disclosed by the record in this case. Proctor for Claimants has made no attempt to so limit his argument. As stated by Judge Dietrich, there was a sharp conflict between the evidence given by the nine witnesses testifying in chief for the Claimants and the nineteen witnesses who testified on behalf of the Petitioner upon the issues of fact involved in this case. The Claimants' witnesses testified to conditions in the sleeping quarters, eating quarters and to unsanitary conditions aboard this vessel which were unbelievable. The testimony of these witnesses was contradictory in many respects and was grossly exag-

gerated upon all the essential issues in this case. The uniformity of the testimony is easily explained in the manner in which the same was introduced. In view of the fact that all of the witnesses were interested, that is, were asserting claims in this proceeding, Petitioner demanded that prospective witnesses be excluded. This demand was refused by proctor for Claimants and was not enforced by the Commissioner. Testimony was brought out very largely by leading questions propounded by proctor for Claimants, over the objection of the Petitioner. Judge Dietrich's criticism of the proceedings before the commissioner was well warranted.

> "It is greatly to be regretted that in taking the testimony, care was not exercised to follow rules which are designed, in a measure, to counteract the natural tendency of interested testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court, undoubtedly these rules would have been enforced, but apparently it was assumed that the commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated, they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight." (Ap. p. 1111.)

The undisputed testimony in this case shows that the S. S. "Victoria" had been operating as a

freight and passenger vessel since the year 1903, between Nome, Alaska, and Seattle. During this entire time, the steerage sleeping quarters had been located on the deck below the tween decks and the steerage dining room and toilets located on the tween deck. The "Victoria" was one of thirteen combination freight and passenger vessels operated by the Alaska Steamship Co. between Seattle and Alaskan ports. Her steerage compartment had been inspected by the local United States inspectors and a certificate (Petitioner's Exhibit 5) issued by said inspectors permitting her to carry 204 steerage passengers. This last certificate was dated May 2nd, 1924. She was subsequently inspected on May 31st, 1924, and an additional certificate issued for the carriage of eighty additional passengers, or a total of two hundred and eighty-four steerage passengers (Ap. p. 794). Before these certificates were issued the United States customs officials had inspected the quarters and certified the cubic space of the same to the United States inspectors (Ap. p. 795, p. 798). The travel between Seattle and Nome is extremely heavy on the first trip in the spring northbound and the travel between Nome and Seattle southbound is extremely heavy on the last trip in the fall. These steerage passengers (Claimants herein) were largely prospectors, mine operators and laborers whose operations were limited to the open summer season, the balance of the year the port of Nome being icebound. In the spring of 1924 the S. S. "Victoria" carried northbound on the trip, leaving Seattle in

June, a total of 257 steerage passengers; with one or two exceptions only, all of the Claimants in this proceeding were passengers on this northbound trip of the "Victoria" in the spring of 1924. Without any exception every one of the Claimants had travelled previously in the steerage of the "Victoria" between Nome and Seattle, some of them as often as twice a year during the last twenty years (Ap. p. 506, p. 1052). It is admitted that the sleeping quarters, the dining quarters, the toilets and all other conditions complained of by the claimants herein were in the same location and in the same conditions as existed on all previous voyages made by said claimants on said vessel.

Despite this admitted fact, an examination of the claims herein show that the Claimants and each of them are asserting a special contract of carriage based upon express representations alleged to have been made to each of said claimants by the agent of the Petitioner at Nome, Alaska, at the time the steerage passenger tickets were purchased from said agent. The agent denied making any express representations as to the food, quarters, etc., as an inducement for the sale of these steerage passenger tickets (Ap. p. 672) and not a single claimant testified to any such express representation or agreement. The claimants and each of them admitted full knowledge as to the steerage quarters aboard this vessel and their right of recovery, if any, must be based upon a breach of the Petitioner's implied contract as a carrier to furnish adequate accommo-

dations such as are customarily furnished to steerage passengers in said trade and to keep the same reasonably clean and sanitary during the course of the voyage and to furnish proper and sanitary food. This, of course, does not mean that the Petitioner was to furnish quarters equal to those furnished first class passengers, nor to furnish food of the same quality and variety.

> "It is obvious, that to a certain extent, some of the discomforts complained of were incidental to a voyage of this description by passengers who had only the right to a second cabin passage. * * * That those who occupied the second cabin should suffer some discomfort from foul air, etc., was unavoidable, for a considerable number of the passengers could not be placed in a single cabin tween decks without being far less agreeably situated than if they had occupied state rooms on the deck above."
>
> *The Sonora,* Fed. Case No. 746.

At the time of leaving Nome, Alaska, on August 22nd, there were fifty-six white passengers in the steerage of this vessel. These passengers consisted very largely of employees of the Hammond Mining Co. at Nome, Alaska, who had gone out on strike at said mine, resulting in the closing of the same before the end of the season. These passengers were all placed in the forward steerage compartment, having a capacity of seventy-two passengers. This compartment was adequately ventilated by two cowl ventilators which went through to the main deck of the steamer and by No. 1 hatch, which was kept open at

all times during the voyage, with the exception of one night when it rained (Ap. pp. 703 to 706. Pet. Ex. 2). At the time of leaving Nome, the vessel had sixty-seven first class passengers. She called at Unalaska, took on board seventeen additional first class passengers, and on August 25th called at Akutan, where she took on cargo, one steerage and one first class passenger, and on August 26th, called at False Pass, where she took on cargo, eighteen first class and sixty-four steerage passengers. She next called at Seward, Alaska, where she took on thirty first class passengers, including Governer Sulzer of the Territory of Alaska and two steerage passengers. She next called at Latouche on August 30th, taking on eight first class and thirty-two steerage passengers. She next called at Drier Bay, taking on eleven first class and thirty-five steerage passengers. At the time of sailing from Drier Bay for Seattle, she had on board one hundred and fifty-two first class and one hundred and ninety steerage passengers. Of the steerage passengers, one hundred and two were Orientals and eighty-eight white passengers. After leaving Nome, standee berths were placed in No. 2 steerage for the accommodation of the additional steerage passengers. This compartment is ventilated by four large ventilators, two forward and two aft, and by No. 2 hatch, which was kept open, excepting when the condition of the weather prevented (Ap. pp. 703-706. Pet. Ex. 2). Shortly after leaving Drier Bay, a paper or agreement of some kind was circulated among the steerage passengers and was signed

by forty-two or forty-three such passengers, *all of whom had taken passage at Nome, Alaska.* The other forty-five or forty-six white passengers refused to sign the paper and none of the one hundred and two Orientals signed the same. This paper contained some form of agreement or representation which was torn off before the same was offered in evidence in this case (see Cl. Ex. C). Demand was made for that portion of the petition which had been torn off, which demand was refused by the Claimants (Ap. p. 754).

Claimants Berglof and Littrel drew up this paper and circulated it among the passengers (Ap. p. 576). Their signatures appeared first on the paper. Claimants' Exhibit C shows the signature of Berglof and Littrel near the bottom of the page. It further shows that whatever was written at the top of the page, above the signatures of these two Claimants, has been cut off and what little remains of the original sheet, with the agreement eliminated, has been pasted on to the bottom of what was originally the *second* page of signatures. That the paper originally contained a form of agreement is admitted by Claimants' witnesses (Ap. p. 622).

It appears from the evidence, however, quite clearly that this paper was circulated upon the representation that the steerage passengers signing the same would get a refund of their passage money (Ap. pp. 965-966, p. 754). The signers of this paper now appear as Claimants in this proceeding, although

only nine of said signers testified in chief as witnesses for the Claimants. Of the signers to this paper, five were seamen formerly employed by the petitioner who had deserted one of their vessels at Nome, Alaska, for the purpose of obtaining higher wages in the mines (Ap. pp. 771 to 777). One at least was an employee in the steerage department whose sole duty was to keep the steerage sleeping quarters properly swept up and cleaned. One complaint made by the Claimants is that this man, also a Claimant, did not perform his duty. At least two of the Claimants were former employees in the steerage department of this vessel—one of whom had worked several seasons (Ap. p. 537), and the other had worked on the northbound voyage in June of the same year (Ap. p. 930).

The various allegations of the claims herein are concisely stated by the United States Commissioner as follows:

First, that the food was not fit for human consumption and that they were unable to eat it and were forced to go hungry or purchase food from under stewards or waiters.

Second, that the steerage was not properly ventilated, causing headache and other disagreeable reactions.

Third, that the steerage was not kept clean, vomit from seasick passengers not being properly removed, causing offensive odors to permeate the steerage.

Fourth: That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health.

Fifth: That gambling was allowed to be carried on in the dining room (on the deck above the steerage) during the daytime and the night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night (Ap. p. 1099).

We will consider their contentions briefly in the order designated by the Commission.

1. That the Food Was Not Fit for Human Consumption and That Claimants Were Unable to Eat It.

Testimony shows without contradiction that the S. S. "Victoria" was equipped with three modern cold storage compartments and one cooler. The uncontradicted evidence of Mr. Nelson, the port steward of the Petitioner, is that all supplies for this and other vessels of the Petitioner's fleet were purchased through his office upon requisition of the chief stewards of the various vessels. That his Company purchased one quality only of provisions for these vessels, with one exception; that all of the fresh meats, vegetables, eggs, bacon and staple supplies are of the very best quality for use by the first class, steerage and crew (Ap. p. 813); that a slightly cheaper

grade of coffee is purchased for the crew and steerage than that purchased for the first class passengers (Ap. p. 813). That all other provisions are of the same quality. A complete list of the provisions supplied by the S. S. "Victoria" at the time she left Seattle for Nome was introduced in evidence as Petitioner's exhibit A-20 and there is no segregation whatever as between first class, steerage and crew provisions.

On the southbound voyage, the chief steward bought additional fresh meats at Seward and Latouche, to be on the safe side (Ap. p. 680). On this round trip voyage the "Victoria" was supplied for 25,000 meals and there were actually served 22,000, leaving a surplus of 3,000 meals upon her arrival at Seattle (Ap. p. 821). As to the quantities supplied at each meal, or rather per day per passenger, it appears that during the late war, the United States Food Administrator obtained accurate data from numerous steamship lines upon which it issued instructions to operators of U. S. Shipping Board vessels (which operators included the Petitioner during the said war) providing for 105.54 ounces of food per day per passenger. On this particular trip of the "Victoria" her records show that she supplied 111.27 ounces per day per passenger (see Pet. Ex. 8, Ap. p. 819).

The testimony of A. Brown, chief cook, shows that on this vessel all of the food supplies were kept in the same compartment, all of the meats and vege-

tables being kept in the same cold storage compartments, where it was impossible for them to become tainted; that all of the food was cooked in the same kitchen on the same range in the same utensils, and there was no segregation or difference between the food supplied the first class passengers, the steerage passengers and the crew (Ap. p. 695). The only difference was in variety, and not in quality or quantity. This testimony is corroborated by the chief steward as to the adequacy of the supply of the food (Ap. p. 679), as to the quality of the food furnished the first class and steerage (Ap. pp. 678-9), and by the steerage steward (Ap. p. 742); by the chief baker (Ap. p. 836); by the storekeeper (Ap. p. 840); by the second steward (Ap. p. 856), and by the chief butcher (Ap. p. 866). It is true that in the steerage compartment the meals are served "family style," there being no seat checks, but this is customary in all steerages (Ap. p. 682). It is contended by Claimants that from time to time they purchased food from some members of the steerage steward's department or from the cooks. This is denied by the steerage employees and the cooks, and an examination of the Claimants' testimony in this respect shows that most of the food claimed to have been purchased consisted of sandwiches and coffee purchased in the evening after the meals were over (Ap. p. 640, p. 666, p. 934), or for delicacies, such as chickens and fresh fruit, which are not ordinarily served in the steerage (Ap. pp. 899-900), in consideration of which the passengers gave the em-

ployees a tip ranging from 25 cents to $1.00 (Ap. p. 900). Each and every one of the officers of this ship testified that they were in the steerage many times during the day, all of them having their uniforms on, the cap showing their official position, and that no complaint was ever made by any of the steerage passengers as to the quantity or quality of food served in the steerage, or as to any other condition alleged to have existed on board of said vessel.

2. Claim That the Steerage Was Not Properly Ventilated.

The ship's plans (Pet. Ex. 2) shows that the steerage quarters were amply ventilated by four cowl ventilators from the outside deck, two ventilators to the tween decks and by No. 1 and 2 hatches, which were at all times kept open, weather permitting.

The chief officer testified in detail as to the ventilation and the adequacy of the same (Ap. pp. 703 to 707), and that no complaint was ever made as to the lack of ventilation; with the exception of one occasion, when a steerage passenger complained that other steerage passengers had stopped up one of the ventilators on the ground that the steerage was too cold (Ap. p. 710). This testimony is not disputed with the exception of the unlicensed testimony of certain Claimants that there was absolutely no ventilation whatever in the steerage.

It is undoubtedly true that in the space occupied by one hundred and ninety passengers there was, to a certain extent, some discomfort from close air, but this condition as stated in the *"Sonora"* case, *supra,* was incidental to passengers travelling in the steerage compartment.

3. Contention that the Steerage Was Not Kept Clean.

It appears without contradiction that George Condell, one of the Claimants herein, was employed for the sole purpose of keeping the steerage properly swept up and cleaned. The Captain testified that he went through the steerage quarters from two to three times a day and so far as he could see, the ventilation was good and the floors and quarters were kept clean and sanitary (Ap. p. 727). During these inspections in passing through the steerage quarters, there was every opportunity for the steerage passengers to complain as to the conditions in said quarters, but no complaint was ever made (Ap. p. 730). It was his testimony that if complaints had been made or he had ascertained from his inspection, the quarters were not being kept clean and sanitary, he would have ordered the chief steward to place additional men in the steerage for that purpose (Ap. pp. 729-730). The chief steward testified that every morning during the entire voyage and as part of his regular duties, he made an official inspection of the steerage quarters for the express purpose of seeing

whether they were kept clean and in a sanitary condition (Ap. p. 684); that there were eight employees in the steerage department, to one of whom was allotted the duty of keeping the sleeping quarters clean. He had no other duties aboard this ship. If the quarters had not been kept clean, there were ample men on board in the steerage department and he would have ordered additional men into the steerage quarters for this purpose (Ap. pp. 685-686). He testified that in addition to his official inspection, he went through the steerage quarters several other times during the day.

> "Q. When you were down inspecting the sleeping quarters, did any of these steerage passengers make any complaint to you?
>
> "A. No.". (Ap. p. 686.)

The steerage steward testified that he went through the steerage sleeping quarters three or four times a day; that the quarters were kept clean and in a sanitary condition and that no complaint was ever made to him by steerage passengers (Ap. pp. 748-749, p. 752).

The third officer testified that he spent considerable time in the steerage quarters while off duty, as he was acquainted with a number of the steerage passengers, but no complaint was ever made to him with reference to any conditions in the steerage sleeping quarters, dining room or toilets (Ap. p. 761).

The chief pantryman testified that he visited the steerage sleeping quarters several times a day and that the same were kept clean and sanitary (Ap. pp. 781-782).

The second steward likewise testified that he made an official inspection of the steerage quarters, both eating and sleeping, every day and that the same were kept in a clean and sanitary condition and that no complaint was ever made to him by any steerage passenger (Ap. p. 853, p. 858).

4. Complaint that Employees Scattered Chloride of Lime on the Deck of the Steerage.

The testimony shows that chloride of lime, which is a well-known disinfectant, was placed in one place in the steerage where a passenger had been sea-sick, only on *one occasion.* Testimony by Mr. Howard, an expert chemist, was to the effect that chloride of lime in such quantity as was placed on the floor of the steerage could not have any injurious effect (Ap. p. 1085). This complaint is not seriously urged excepting with reference to the claim of Jack Miles, deceased, and we will consider the same more fully in discussing said claim.

5. That Gambling Was Carried On in the Dining Room, Depriving the Steerage Passengers of a Place to Lounge During the Day and Evening in This Steerage.

There were one hundred and ninety passengers in this steerage. The testimony of Claimants' own witnesses is to the effect that the Orientals kept very much to themselves. The capacity of the four tables in the dining room was forty-eight passengers. It is undoubtedly true that during the day and a portion of the nights there was cardplaying and possibly a certain amount of gambling carried on in the steerage dining room. This, however, was carried on almost entirely by the steerage passengers themselves. As stated by Judge Dietrich, Claimants' evidence as to the extent of gambling was undoubtedly exaggerated. There were signs in the steerage prohibiting gambling and the master repeatedly warned the steerage passengers to refrain from gambling (Ap. p. 735). On a long ocean voyage, it is impossible to prevent cardplaying and incidentally a certain amount of gambling. This, however, would not constitute a breach of contract of carriage, unless the steerage passengers were deprived of some rights thereby. The claim that the passengers were deprived of the use of these quarters for lounging is certainly not well taken, as the men engaged in cardplaying and gambling were all members of the steerage and entitled as such to the use of these quarters. There was some suggestion in the evidence that one member of the steerage crew was engaged in the gambling, but he was not identified and all of the members of the crew who were called denied that they took any part, either in the card playing or the gambling.

It appears without contradiction that on this particular trip the Captain had relaxed the rule universally applied on passenger vessels with reference to restrictng the steerage passengers to their own quarters and the main deck forward. On this particular voyage the passengers were allowed the free run of the ship, including the first class deck space, smoking room and social hall. The testimony in this respect is uncontradicted, Captain Davis (Ap. p. 733), Chief Steward (Ap. p. 689), Purser Parker (Ap. pp. 800-801), First Officer Baker (Ap. p. 714), Third Officer Aylward (Ap. p. 762), W. W. Mason, chief baker (Ap. p. 837), S. R. Davis, storekeeper (Ap. p. 843, p. 850), E. Lowery, second steward (Ap. p. 858), Freight Clerk Lawson (Ap. pp. 872-73), and in fact is admitted by claimants' own witnesses (Ap. p. 891).

A few of the claimants make a further complaint that a large quantity of salmon was loaded in the after part of No. 2 steerage, as a result of which, said quarters were unduly crowded. Like the other complaints urged in this case, this particular one was grossly exaggerated. The fact is that 1200 cases of canned salmon was stowed against the after bulkhead to give the ship a proper trim (Ap. p. 1026). The salmon only covered half the space between the bulkhead and the after end of No. 2 hatch (Ap. p. 1023). There were 210 standee bunks in place or 20 more than the total number of steerage passengers (Ap. p. 1023), and there was

ample space for additional bunks, which were not required (Ap. p. 1024).

Testimony of these witnesses introduced by the petitioner sustains the findings of the Commissioner and the decision of his honor, Judge Dietrich. It is very apparent from a reading of the record in this case that these claims were asserted against the petitioner in accordance with the plan which was conceived on board the S. S. "Victoria" during her southbound voyage by a group of disgruntled miners from the Hammond Mine, Nome, Alaska, who were forced out of employment and their season's wages seriously curtailed by a strike, in which they participated, and probably precipitated. These men were fully aware of the accommodations afforded in the steerage quarters of the S. S. "Victoria" at the time they purchased their tickets and it was upon the representation that they could recoup their losses, at least to the extent of recovering back their passage money, that the ringleaders in this scheme induced a substantial number of their fellow miners and strikers to sign the agreement which subsequently resulted in this proceeding.

As well stated by Judge Dietrich, these passengers were not women and children, or inexperienced men. They were all experienced men and of a character and temper to vigorously assert their rights. As previously stated, five of the claimants were deserters from the petitioner's steamer "Oduna" at Nome; several were previous employees

in the steerage department of this vessel and one at least an employee on this particular voyage and one of them an admitted active participant in the gambling alleged to have been carried on on this voyage, and practically all of them strikers from the Hammond mine. They had traveled on this vessel repeatedly on previous voyages and knew what steerage accommodations and steerage food should be furnished them. As admitted by one of the claimants, their real complaint was that Orientals were placed in the steerage on the southbound voyage, but surely this does not constitute a breach of contract. They well knew that Orientals customarily traveled in the steerage and so far as the record shows, these Orientals disported themselves in a more orderly and cleanly manner than the claimants in this case. If these men had had any such grievance as some of them have testified to in this case, they would have vigorously asserted the same. The fact that during the entire voyage not a single complaint was made to an officer of this vessel is in itself very persuasive that the present claims are unfounded.

The carrier's duty to its passengers is well stated by his honor, Judge Hunt, in the *"Santa Clara"* case, 174 Fed. 913:

> "When the appellees bought their tickets and boarded the ship, they had a right to reasonably clean and comfortable quarters and they had a right to expect that the ship's officers and employees would do all in their power to so furnish them."

The extent of the carrier's obligation in this respect is dependent upon the class of accommodations contracted for by the passengers. It was not to be expected that the accommodations in the steerage compartment should be of the same character, either as to ventilation or cleanliness, as accommodations in the first class.

As stated in the *"Sonora" supra,* certain discomforts are incident to an ocean voyage in second class or steerage quarters. With one hundred and ninety passengers occupying open space in close proximity to each other, it was unavoidable that there should be some discomfort from close air, etc. What would satisfy one passenger would not satisfy other passengers in the same quarters. These conditions are unavoidable.

It is very significant that not one single steerage passenger, either white or Oriental, signed this agreement aboard the "Victoria" or filed a claim against the Petitioner or joined in this proceeding, as a claimant, excepting this group of disgruntled miners who took passage at Nome.

Not a single first-class passenger joined in this proceeding or testified on behalf of Claimants, although the evidence stands uncontradicted that the same food (differing only in variety) was served to the first-class passengers as was served to the steerage passengers.

We respectfully submit that the decree of the

lower court dismissing the claims for breach of contract of carriage should be affirmed, and that the decree disallowing costs to the petitioner should be reversed.

CLAIM FOR PERSONAL INJURY AND DEATH OF JACK MILES.

Jack Miles was a steerage passenger on this voyage of the steamer "Victoria." He had been working as a carpenter for a mining company at Nome during the summer season, at wages of $8.00 per day and board. The "Victoria" left Nome on August 22nd, and arrived at Akutan on August 24th, at which port she loaded 800 drums of whale oil, weighing approximately 1200 pounds per drum. In addition to the ship's crew a number of the steerage passengers were employed to assist in loading this whale oil, Claimant, Jack Miles, being one of the men so employed. These drums of whale oil were loaded in various parts of the ship, and while loading the same in No. 4 hold, Jack Miles claims to have been injured.

He testifies that these drums were lowered into the hold by the ship's winches, that five men besides himself were working in the hold and that it was their duty to roll these drums into the after part of the hold where they were supposed to be blocked up

and stowed by some member of the ship's crew. It was his claim that there was insufficient light in the after part of No. 4 hold; that he rolled one of the drums into the after part of said hold where it was dark, that he could not see the man who was supposed to block up the drum and without waiting to see whether the same was blocked up, or even that the said man was present in his position to take care of the drum, that he, Miles, turned around to walk back to the square of the hatch, and had taken only a few steps when the drum rolled back and crushed his heel.

"Q. How far back did you roll them from the place where they came down?"

"A. Well, I should judge it was over fifty feet, I don't know how much further it seemed like it was quite a ways back there. It was in the dark there. I could not see the place with the light they had and I do not know what it looks like back in there and there were three of us would roll it back and then go back to get another one. While I was trying to get away from there, I was walking away from there and one of the barrels rolled back and caught my foot."
(Ap. p. 439).

"Q. After you got them aft how would you block them up?"

"A. They were not blocked up, they were rolled up there. I saw one blocked when it started to roll a little bit."

"Q. Were you working blocking them up?"

"A. I was not supposed to pay any at-

tention to that part of it. I was supposed to go back and start another barrel on its way."

"Q. All you were doing was rolling barrels back, and another man also was blocking them up?"

"A. Two of them went back and started to get them away from the hatch. Then that man would look after them back there and then he would come and help us roll it back."

"Q. What did you put under them after you got them back there?"

"A. The deck was all we had to put under them."

"Q. You had to set them on their end?"

"A. That is what they were supposed to do, but I didn't. After I got hurt, I didn't do much then."

"Q. Before you got hurt were you helping roll them back and then upend them?"

"A. We upended three or four at first and then we rolled them over to the side of the ship because they would not stay up on end. There was not room enough to set them up on end."

"Q. Were you just rolling them there and leaving them there on the sides?"

"A. Left them there for this fellow to look after them" (Ap. pp. 452-453).

"Q. * * * After you had rolled this barrel back to him, do I understand you turned around and then the barrel rolled and hit you?"

"A. I started to walk back toward the hatch and the barrel we had just previously rolled there from the hatch rolled back and hit me." Upon this evidence Judge Dietrich held:

> "The evidence upon this claim is extremely meagre and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was it was the negligence of a fellow servant."

We submit that upon the merits of the claim there was no evidence to establish negligence on the part of the Petitioner. According to the Claimant's testimony, he rolled this heavy drum back into the after part of the ship where it was so dark that he could not see, and without upending the drum or blocking it off to keep it from rolling, or without waiting to deliver the drum to the man whose duty it was to stow the same, he turned around and had taken a few steps when the drum rolled back and struck his heel. There were six men engaged in this work, three in each gang. The member of the crew in the after part of the ship in charge of the stowage was supposed to block off the drums to keep them from rolling. Whether he was engaged in blocking off a drum which had been rolled back by the other gang or was even present in the after part of the ship at the time the Claimant, Miles, rolled this particular drum into the after part of the ship does not appear from the evidence. Certainly it was Miles' duty to retain possession of the drum until he had safely delivered the same to the man whose duty it was to stow said drum. Miles does not claim that he performed this duty or that he took any precaution whatsoever to see that this heavy drum was safe before he released it. On the

contrary his testimony is that he rolled it into the after part of the ship where it was dark, immediately turned around and had only taken a few steps when the drum rolled back and struck him. Certainly there is no evidence of Petitioner's negligence.

On the question of light, the First Officer testified that there were ample lights in use, that no complaint was made to him as to the necessity for additional lights, that there was an extra supply of lights aboard and that additional lights could have been furnished if required (Ap. p. 717). Claimant Miles makes no contention that any promise was made to furnish additional lights. He had been engaged in this work for seven hours and if in fact it was true that the insufficiency of light was the cause of the accident that condition was known to the Claimant and the risk incident thereto was assumed by him.

After completion of this work at Akutan, Miles was paid off and signed the Longshoremen's payroll which contained the following release:

> "In consideration of receiving the amount stated below from the Alaska Steamship Co. I hereby release and discharge the Alaska Steamship Co. from all claims, demands and causes of action whatsoever from the beginning of the world to this date." (Petitioner's Exhibit 3, being copy of original payroll.)

This accident having occurred on August 25th, no complaint was made by the Claimant until the

following morning, when he went to the Stewardess, who bathed his foot in a solution of salts. No further treatment was requested or given. On August 26th the vessel arrived at False Pass and loaded some 29,000 cases of canned salmon. Claimant, Miles, not only did not make any complaint to any of the ship's officers as to his alleged injury but on the contrary he solicited the First Officer for employment at False Pass, and together with other steerage passengers was employed to assist in loading this canned salmon. He worked for eighteen and one-half hours at False Pass, receiving $18.50.

"Q. What character of work was he doing?"

"A. Loading salmon."

"Q. What particular work was he doing in connection with loading salmon?"

"A. Piling and carrying when I saw him."

"Q. Carrying cases and piling them."

"A. Yes sir."

"Q. Had he made any complaint to you prior to performing this work at False Pass with reference to being injured?"

"A. No sir."

(Testimony, First Officer, Ap. p. 716.)

Miles made no complaint to the ship's officers with reference to his alleged injury until two days after the vessel had left False Pass (Ap. p. 718). The vessel arrived at Seward on August 28th and

remained there for 24 hours. Claimant did not go to a doctor at this port and on August 30th the vessel called at Latouche and remained there for 12 hours, but the Claimant did not consult a doctor at this port. After arriving at Seattle on September 4th the Claimant, Miles, joined with other steerage passengers in making demand for $250.00 damages for breach of contract of carriage, but did not at said time make any demand for his alleged personal injury. On September 25th, three weeks after the vessel arrived in Seattle, Claimant, Miles, called upon the Superintendent of the Petitioner and was given an order for medical treatment at the Virginia Mason Hospital. He testified that he was given treatment first by Dr. Dowling and afterward by Dr. Lyle of said hospital. Dr. Dowling was produced as a witness on behalf of the Claimant and testified:

"Q. Will you tell the Court the nature of the injury you found?"

"A. It was a fracture of the fifth left metatarsal bone."

"Q. Was there any straining or tearing of the ligaments of the ankle on the left foot?"

"A. There was nothing apparent."

* * * * *

"Q. Had the bone ever been set before he came to you, as you recollect?"

"A. It was not out of place when I examined it."

"Q. What did you do?"

"A. I dressed it for him."

"Q. And have you ever examined him since that time?"

"A. Not that I remember" (Ap. p. 592).

"Q. And the use of the foot with that bone rubbing against the side of the shoe would naturally cause pain and prevent any form of healing until it was set in the proper way and at the proper time, would it not?"

"A. We usually consider that the wearing of the shoes is all that is required for a fracture like that."

"Q. No use to go and see a doctor at all?"

"A. Not a bit."

"Q. Was not any necessity for having the bone set?"

"A. There was no necessity for the bone was not out of place" (Ap. p. 594).

The doctor further testified that the fifth metatarsal bone is not a very important bone in the foot (Ap. p. 593), and on cross examination:

"Q. What result would you expect from the fracture of that kind if you had given it a treatment?"

"A. Such a fracture should result in the complete cure."

* * * * *

"Q. Within what length of time should it be a complete healing?"

"A. This disability is ordinarily considered to be about three or four weeks" (Ap. p. 595).

No other medical testimony was offered.

During the progress of this case Jack Miles suddenly died in Tacoma on October 17, 1925, and his widow was substituted as a Claimant and filed an additional claim for $10,000.00 upon the ground that the death of said Claimant had resulted from the conditions complained of on board the "Victoria," that is, the close quarters and food. Like most of the contentions in this case this claim was without any foundation whatsoever. Dr. Perry, Coroner of Pierce County, held an autopsy upon the Claimant, Miles, and found that he had died directly from a cerebral hemorrhage. Dr. Perry found that Miles' vital organs were all in perfect condition, excepting that he was suffering from sclerosis and hardening of the arteries which were the secondary causes of his death (Ap. pp. 1075-1076). There was no connection whatsoever between this man's injury or the living conditions on the steamship "Victoria" and his subsequent death.

It appears that following Mr. Miles' return to Seattle after completion of the voyage of the "Victoria" he did in fact resume his occupation as an interior decorator and painter, working at the Winthrop Hotel in Tacoma and the Donnelly Hotel in Tacoma.

The present administratrix of the estate of Jack Miles was married to him on March 15, 1925, something over six months after he claims to have sustained this minor injury to his foot on the "Victoria" (Ap. p. 1063).

We respectfully submit that the evidence entirely fails to show any actionable negligence on the part of the Petitioner in connection with the slight injury to the Claimant's foot. At most the injury complained of was of a minor nature with a disability at the outside not exceeding three to four weeks. There was no showing that Claimant lost any earnings during this period of disability. He had been working as a carpenter in the mines at Nome and upon his return to Seattle he had no regular employment, nor is there any showing that he could have obtained employment. We think this claim entirely fails both from lack of proof of actionable negligence and from lack of proof of any damage.

The Commissioner, finding against the Claimants on every issue presented in these proceedings and recommending as a Conclusion of Law that the claims, and each of them, be dismissed, further recommended that each side stand its own costs. The Lower Court in affirming the Findings and Conclusions of the Commissioner entered a decree disallowing costs to the Petitioner. It is a settled rule in admiralty that costs will follow the decree except in exceptional cases where in the discretion of the trial Court costs may be disallowed. The rule is stated in *Benedict on Admiralty,* 5th Ed., Sec. 435, as follows:

> "Costs are always in the discretion of the Court. This discretion, however, is a judicial discretion and though an appeal will not lie on

> a question of costs alone, an Appellate Court, in passing on the merits, will upon proper assignment of error, correct an abuse of discretion or a departure from settled principle in the disposition of costs. Costs generally follow the decree, but circumstances of equity, of hardship, of oppression or of negligence induce the Court to depart from that rule in a great variety of cases."

In the case at bar these Claimants asserting a demand, which has been found to be entirely without justification, both by the Commissioner and his Hon. Judge Dietrich, commenced thirty separate actions in the State Court and were threatening twelve additional actions in said court. To avoid this great multiplicity of suits and the great cost incident thereto, and to protect the Petitioner against possible judgments far in excess of the appraised value of the vessel and her pending freight, the Petitioner was forced to commence this proceeding at very considerable cost. A very large portion of the cost incident to the commencement of the Limitation Proceedings amounting to close to $1000.00 will have to be borne by the Petitioner in any event. To disallow taxable costs incurred by the Petitioner in a suit of this character where there are no equities in favor of the Claimants would be merely to encourage the commencement of these unfounded suits. This matter being before this Court, in Admiralty, as a trial *de novo,* it has full power in its discretion to correct any errors in the decree below even though the Petitioner herein did

not take a cross appeal. This rule is so well settled as to not require any citation of authority.

We respectfully submit that the decree of the Lower Court should be affirmed in all respects excepting that the Petitioner's taxable costs in the Lower Court and in this Court should be allowed.

Respectfully submitted,

LAWRENCE BOGLE,
CASSIUS E. GATES,
Proctors for Appellee.